



Pieraccini, M. (2018). Taking Stock of Italian Commons: Un-common Grounds? In *Legal Strategies for the Development and Protection of Communal Property* (pp. 38-57). (Proceedings of the British Academy). Oxford University Press.

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## **Chapter 3 Taking Stock of Italian Commons: Un-Common Grounds?**

**Margherita Pieraccini**

**Abstract:** This chapter provides a critical mapping of Italian commons, investigating the conceptualisation of property on both traditional commons (agricultural common land) and new commons (commoning projects and practices fighting neoliberal policies and laws). The key aim is to understand how traditional and new commons define and re-define property through law, customary practices and social movements and if there are similarities or differences between the two. Although both traditional and new commons attempt to transcend the public-state/private-individual dichotomy in property law and are permeated by a sustainability ethos, the differences between traditional commons and new commons are conspicuous, rendering impossible the transfer of legal concepts from one category to the other. Such differences relate to the substantive and procedural property rights of the actors involved and to their relationship with constitutional principles.

**Key Words:** Common land; new commons; Italy; property law; constitutional principles.

### **INTRODUCTION: WHAT ARE ITALIAN COMMONS?**

Drawing on the commons literature, a distinction can be made between traditional and new commons.<sup>1</sup> Traditional commons are associated with rural landscapes and are concerned with access to, distribution and management of common-pool natural resources, such as land or fisheries, in a given locality among a limited set of users. New commons refer to various

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<sup>1</sup> G. Bravo and T. de Moor, 'The Commons in Europe: from Past to Future', *International Journal of the Commons*, 2(2008), 155–161.

shared (or shareable) resources such as the internet, biodiversity, knowledge, public urban areas, non-for profit organisations etc. aimed at the promotion of social justice and sustainability.<sup>2</sup>

This chapter focusses on Italian commons, exploring the different articulations of property and property relations on both traditional and new commons. Traditional and new commons in Italy have seldom been studied together by lawyers. If traditional commons have been the subject of study of a large number of agricultural lawyers and legal historians for a long time,<sup>3</sup> new commons have been the focus of a sub-set of radical private law scholars.<sup>4</sup> Recently, a few attempts have been made in the Italian commons' literature to map out both traditional and new commons, pointing to the possibility of applying the legal principles of traditional commons to new commons.<sup>5</sup>

This chapter contributes to this mapping exercise by providing a critical overview of traditional and new commons in Italy to understand if there are similarities between the two

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<sup>2</sup> C. Hess, 'Mapping New Commons', presented at The Twelfth Biennial Conference of the International Association for the Study of the Commons, Cheltenham, UK, 14-18 July, 2008 at: <http://surface.syr.edu/cgi/viewcontent.cgi?article=1023&context=sul>

<sup>3</sup> See, for example, E. Romagnoli and C. Trebeschi, *Comunioni Familiari Montane* (Flero, Padeia, 1975); P. Grossi, *Un altro modo di possedere: l'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria* (Milano, Giuffrè, 1977); F. Marinelli, *Gli usi civici* (Milano, Giuffrè, 2003).

<sup>4</sup> See for example, the work of Ugo Mattei, *Beni Comuni: Un Manifesto* (Roma-Bari, Laterza, 2011). M.R. Marella, 'Il diritto dei beni comuni. Un invito alla discussione', *Rivista critica del diritto privato*, 1(2011), 103-118; M.R. Marella, 'Il diritto dei beni comuni. Oltre il pubblico e il privato', in G. Allegri, M.R. Allegri, A. Guerra and P. Marsocci (eds), *Democrazia e Controllo Pubblico dalla prima modernità al web* (Napoli, Editoriale Scientifica, 2012), pp.75-88.

<sup>5</sup> A. Dani, 'Il concetto giuridico di "beni comuni" tra passato e presente', *Historia et Ius*, 6(2014), 1-48; F. Marinelli, 'Usi civici e beni comuni, Rassegna diritto civile', 2(2013), 406-422; V. Cerulli-Irelli and L. De Lucia, 'Beni comuni e diritti collettivi', *Politica del Diritto*, 1(2014), 3-36.

categories or if they inhabit an un-common ground. Contrary to those scholars who have proposed an application of the legal principles of traditional commons to the new ones, this chapter argues that traditional and new commons understand property too differently to be subsumed under a unified normative framework. Although both challenge the private/public dichotomy in property law and are permeated by a sustainability ethos, it is only with the new commons that the social function of property becomes central stage and with it a procedural understanding of property aimed at deliberative democracy. In a sense, new commons in Italy are an example of open access commons defined by Benkler as:

institutional arrangements that cover much larger ranges of resources in modern society, and these resources are generally open to the entire public or at least to some very large, and largely undefined, set of users, both individual and corporate. Their defining feature is not finely designed allocation of well-behaved and predictable (with known uncertainties) resource sets and needs, but high flexibility and an absence of power of exclusion by early users and uses of the resource against later users or uses.<sup>6</sup>

The traditional Italian commons fit squarely within the agrarian domain and are primarily concerned with the question of rights to land (whether private, state or in common ownership) of particular communities representing a type of limited-access commons ‘where members of a clearly defined group have a bundle of legal rights including the right to exclude non-members from using that resource’.<sup>7</sup>

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<sup>6</sup> Y. Benkler, ‘Between Spanish Huertas and the Open Road: A Tale of Two Commons?’ in B. M. Frischmann, M. J. Madison, and K. J. Strandburg (eds), *Governing Knowledge Commons* (Oxford, OUP, 2014), pp. 69-98 at 92.

<sup>7</sup> C. Hess and E. Ostrom, ‘Ideas, Artifacts and Facilities: Information as a Common Pool Resource’, *Law & Contemp. Probs.* 66 (2003), 11-145 at 121.

Therefore, if the law on traditional commons, both in its different customary manifestations and in statutes, has been concerned with land-based claims, in the new commons' debate, the law is employed for discussing constitutional questions about procedural and substantive rights in relation to the public good. Property is however still central stage: if in traditional commons property is about claiming, acknowledging and sometimes silencing rights of commons depending on the relationship between statutory law and customary law; in new commons the Italian Civil Code's categorisation of property is deconstructed in an attempt to fight against neoliberal laws and policies. Interestingly, the tools used for such deconstruction often include references to key constitutional principles, thereby showing that current pro-commons movements do not dispense with the law altogether but actually selectively appropriate and interpret the law that best support their *commoning* projects.

The chapter is broadly divided into three parts: the first considers traditional common lands, emphasising the importance of customs in shaping their management and their diversity.<sup>8</sup> Historically, such diverse customary practices have been subjected to a simplification by the legislator with the law of the 16 June 1927, n. 1766 (hereafter the 1927 law), which sought to erase diversity in order to fit the common lands into a rigid and single property legal category. If customary laws reflected the practices on the common lands, it will be argued that the 1927 law reflected a capitalist logic indifferent to maintaining a close link between the commoners and their land.<sup>9</sup> This led to the disappearance of many common lands and management practices, though some examples of common lands in contemporary Italy, which have been able to maintain close ties to customary law, are visible, especially in the northern mountainous regions of the country, taking the form of communal property. The

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<sup>8</sup> [For further discussion of the role of custom in commons management, see Rodgers in this volume: eds].

<sup>9</sup> [Compare the situation in contemporary China where the law reinforces the link between community members and their land. See Xu and Gong in this volume: eds].

second part of the chapter considers the new wave of Italian commons, where the concept of the commons is politicised through direct action (occupation of urban spaces such as the Theatre Valle in Rome), coupled with attempts at reforming property law to disentangle ownership of goods from their categorisation as commons using, inter alia, expansive readings of the Italian Constitution and bringing into the discussion procedural questions about deliberation. The third part provides concluding remarks focussed on the changing role and use of law on commons to articulate property and property relations from traditional to new commons and on the difficulty in subjecting them to similar legal principles and rules. What will emerge from the analysis below is that, rather than a fixed legal category, property is relational and fluid in the context of Italian commons.

### **TRADITIONAL COMMONS AND AGRARIAN PRACTICE IN ITALY**

The first part of this chapter is concerned with property relations in traditional commons in Italy, pointing to their heterogeneity, close link to agrarian practice and custom and their relationship with statutory law. It starts by providing an historical excursus into the emergence of traditional common lands in Italy and a consideration of the way in which national law rethought property relations in commons. If during Medieval times commons flourished, with the end of the *Ancient Regime* and the rise of new conceptualisations of property based on the primacy of individual ownership, the commons suffered. However, this has not implied a complete disappearance of traditional commons from the Italian landscape today and the case of mountain northern communal properties will be considered to understand the relevance of customary law in regulating property rights and its difficult relation with constitutional principles.

## TRADITIONAL COMMONS THROUGH HISTORY

The birth of traditional common land in Italy can be traced back to the Middle Ages, though it is possible to speak about shared grazing rights on pastoral land since the Roman time with the *ager compascuus*, where the owners of lands adjacent to the grazing land could exercise rights of common of grazing. However, the predominant conception of property in Roman time was that of the *dominium* i.e. the quiritarian<sup>10</sup> ownership of a thing. As the legal historian Grossi observed,<sup>11</sup> it is only in the Middle Ages that the concept of the *dominium* was devitalised in Italy privileging a direct and more communitarian relationship with the land, based on use rather than title. The devitalisation of the *dominium* was partly due to changing socio-economic and environmental conditions but also to the influence of Germanic juridical experiences (*Gewere*) emphasising the physical possession of the land and the direct, concrete relationship with it, rather than abstract title. During the Middle Ages, we see the compression of the *dominium* due to the number of new uses and entitlements limiting the owner's freedom and favouring the redistribution of the resources.

The commons in the Middle Ages comprised both communal properties and private manorial lands over which rights of common (e.g. *ius lignandi*, *ius herbandi*, *ius pascendi*, *ius venandi et piscandi*) existed. Local customs played a fundamental role in governing property relationships on commons rendering very arduous any attempt at categorising and mapping agrarian commons within a single framework.<sup>12</sup> The State, which in the 19<sup>th</sup> and 20<sup>th</sup> century became a fundamental force in the regulation and suppression of the commons, played only a marginal and discontinuous role until the end of the *Ancient Regime*. Indeed, the state

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<sup>10</sup> In Roman law, full ownership over a thing held under a legal title by roman citizens, known as *quirites*.

<sup>11</sup> Grossi, *Un altro modo di possedere*.

<sup>12</sup> Dani, 'Il concetto giuridico di "beni comuni" tra passato e presente' at 22.

disciplined only certain aspects<sup>13</sup> without repealing the local norms produced, inter alia, by municipal statutes, uncoded agrarian practices, corporations, religious communities and feudal partnerships. A pluralist juridical framework therefore existed determining property relations in commons.<sup>14</sup> Nevertheless, two general points can be made: firstly, that the rights of common belonged to a restricted identifiable community (e.g. members of a *villa*, of a municipality, of a restricted circle of families) and secondly that the rights of commons were based on customs and agrarian practices and therefore were directly linked with the use of the resources. Guaranteeing to the community the rights to satisfy its basic needs was the purpose of the commons in Medieval times. This means that the key issue for the communities holding rights of commons was the concrete possibility of exercising them, rather than questions over ownership.

This juridical pluralism and direct link between the user and the resource in question in the articulation of entitlements began to be suppressed with the legal codifications of the 19th century, the rise of the centralised State and individual private property and the loss of regulatory powers of the municipalities. The commons came to be linked to the agrarian feudal past, which was to be rejected in the name of economic and political liberalism. English empiricism and the French Enlightenment influenced European (Italian included) understandings of property to a great extent, positioning individual private property as the model that could best guarantee economic efficiency and productivity. The French *Code civil* strongly presented a model of property centred on individual and exclusive rights. This is also visible in the Italian Civil Code of 1865 derived in large part from the French one and consequently adopting a similar conceptualisation of property. Nevertheless, two laws

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<sup>13</sup> For example prohibiting rights of common of hunting in areas valuable to the king. See, A. Dani, 'Pluralismo giuridico e ricostruzione storica dei diritti collettivi', *Archivio Scialoja-Bolla*, 1(2005), 61-84.

<sup>14</sup> Dani, 'Pluralismo giuridico e ricostruzione storica dei diritti collettivi' at 12.



concerning formal papal provinces were passed by Parliament that recognised the commons and cooperative management practices as part of agricultural policy (law of the 24 June 1888, n. 5841 and law 4 August 1894, n.397). However, these laws were never implemented due to the difficulty encountered in paying the compensation settlements and therefore were suspended a few years later by the law of 8 March 1908, n. 76.

Common land then became the subject of the 1927 law and the implementing regulation (Regal Decree of the 26 February 1928, n. 332, hereafter the 1928 decree). Due attention will be paid to this law here because it is the only national statute on common land and it is still in force today. The law was drafted during Mussolini's times and reflected the agrarian capitalist logic of the time. Its aim was to provide a single legislative framework for both the enclosure of certain commons and the regulation of the remaining ones within the sphere of public law. In doing so, it proposed a simplified and unified vision of the commons, primarily based on the experiences of Southern Italy. In Southern Italy *civic uses* were rights of common exercised on manorial lands, disentangled from manorial lands by early 19<sup>th</sup> century laws related to the abolition of feudalism. Such 19<sup>th</sup> century legislation influenced the 1927 legislator. The *civic uses* of Southern Italy were very different from typologies of commons existing in northern and central Italy, which included also communal properties. However, the 1927 law did not make such a distinction, extending the southern Italian model to the whole country. Such monolithic representation of common land by the 1927 law has been amply criticised in the literature.<sup>15</sup>

Under the 1927 law, a distinction was made between *civic uses* on private property (defined as *jura in re aliena*) and *civic uses* on communally-owned lands (*jura in re propria*). *Civic*

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<sup>15</sup> See, for example, V.Cerulli Irelli *Proprietà pubblica e diritti collettivi* (Padova, CEDAM 1983); and P. Grossi, 'Assolutismo Giuridico e Proprieta' Collettive', *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, XIX (1990), 505-556; F. Marinelli, *Gli Usi Civici*.

*uses* on private property were subject to dissolution (*liquidazione*), thereby banning situations in which a property would be ‘shared’ between the owner and the commoners. Article 5 of the 1927 law sets out the method to be used to dissolve the *civic uses*, mainly borrowed from the 19<sup>th</sup> century laws of Southern Italy. The land in question is divided into two parcels (quotas), one of which is left to the owner where no *civic uses* could be exercised while the other transferred to the relevant municipality where the rights of commons remain exercisable by the residents (article 1). The parcel assigned to the municipality has to be commensurate to the value of the *civic uses* dissolved on the quota retained by the owner. The law specifies that compensation should be higher if the *civic uses* are used for economic purposes rather than just for subsistence. As an exemption, lands that had been improved and developed can be enjoyed by the owner in perpetuity on condition of paying a stated yearly rent to the municipality (i.e. emphyteusis). The yearly rent should be commensurable to the value of the rights of common previously exercised on the land (article 7). Although the 1927 law treated this as an exemption, it became the standard procedure to dissolve rights of common due to pressures from agricultural policy.<sup>16</sup> The 1927 law requires the *civic uses* to be declared within 6 months of the publication of the law, hence the timeframe in which to operate was very tight.

As for the community-owned lands (*jura in re propria*), the 1927 law uses the terminology of *civic uses*, which, as already observed, is a distortion and simplification of the varied constructions and practices of property relations in Italian commons. Communal properties are subject to the same regulation as those portions of lands assigned to the state and municipality as per article 1. All of these communal properties are subdivided into two categories under article 11. Category A comprises the lands suitable for pasture and forest use and category B those suitable for cultivation. Category A’s lands are defined as inalienable,

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<sup>16</sup> M. A. Lorzio, ‘Usi Civici’, *Volume XXXII Enciclopedia Giuridica* (Roma, Treccani, 1994), pp.1-23.

not acquirable by prescription, indivisible and to be left as forests and grazing lands where rights of commons could be exercised within the limits of article 521 of the 1865 Civil Code, now article 1021 of the current 1942 Civil Code (i.e. for satisfying the needs of the users and their families). Changes of use for category A lands is only permitted in the name of the public interest under article 41 of the 1928 decree. Category B's lands are subdivided in parcels (quotas) assigned to individual farmers and therefore privatised.

Finally, the 1927 law has introduced the principle of legitimate occupation, i.e. the occupier *sine titulo* could become the single owner of the land if he/she had occupied the common land for at least ten years and made substantial developments on it (Article 9). The *civic uses* Commissioners, magistrates with administrative and legal functions, were responsible for implementing the 1927 law and settling any disputes regarding the dissolution. The law did not enclose all common lands but in an effort to prioritise agricultural capitalism and private property, it aimed at abolishing *civic uses* on private land and privatising those commons (category B) that could be used for agriculture. As a consequence of the 1927 law, only category A (non-agricultural commons) should have persisted to be owned and regulated primarily by state bodies (e.g. municipality) on behalf of the local community entitled to exercise rights of common over them.

Overall, the 1927 law can be seen as an attempt at subsuming all commons under a single public law regime, derived from the experience of southern Italian states. By including also mountain communal properties within the conceptual parameters of *civic uses*, the law had the effect of undermining the diversity characterising property relations on Italian commons and the risk of transforming the remaining commons into goods to be owned by the state and subject to public law requirements.

Such public law characterisation of mountain communal properties that the 1927 law called for was strongly opposed by some jurists (notably Giangastone Bolla)<sup>17</sup> and by the commoners themselves aiming at vindicating common ownership of these resources and being recognised as a private body. Such struggles saw initially some local level victories (e.g. legislative decree 2 May 1948 n. 1105 on the *Regole* of Cadore recognising that the 1927 law did not apply to these *Regole* and that they could manage the commons according to their own local statutes and bylaws). At the national level, article 34 of the law of the 25 July 1952, n. 991, article 10 of law of the 3 December 1971, n.1102 (hereafter the 1971 law) and article 3 of the law of the 31 January 1994, n. 97 (hereafter the 1994 law) recognised that mountain common properties are to be regulated following their own bylaws and have the juridical personality of a private association. The lands are to be used exclusively for agricultural, forest and grazing activities (known in Italian law as *agro-sylvan-pastoral* uses) with a view to protecting the environment. This is in line with law of the 8 August 1985, n. 431 (known as the Galasso law) which includes Italian common lands within the list of lands bound by environmental and landscape considerations, therefore limiting their use to agro-sylvan-pastoral activities and assigning them a public interest (environmental) function. Also the Constitutional Court has confirmed the contribution common lands make to environmental protection and therefore their fulfilment of a public interest function.<sup>18</sup>

There is another legislative development that is worth noting as an attempt to overcome the simplifying ethos of the 1927 law. The law of the 15 January 1972, n. 11 transferred the administrative functions of the *civic uses* Commissioners to the Regions and the

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<sup>17</sup> For a description of the work of Bolla, please see C. Trebeschi and A. Trebeschi, 'Appunti per un ricordo di Gian Gastone Bolla', *Archivio Scialoja-Bolla*, 1(2003), 15-34 and P. Grossi 2008, *Nobiltà' del Diritto: Profili di giuristi* (Milano, Giuffrè Editore, 2008), pp.13-18.

<sup>18</sup> Corte cost. sent. n. 156/1995 and n. 310/2006.

Commissioners retained only jurisdictional functions to resolve disputes regarding *civic uses*. Assigning the administration of common lands to the Regions has contributed to partially overcoming the reductive monolithic conception of the commons endorsed by the 1927 law since each Region issues a regional law for the governance of common land reflecting the regional and local priorities. However, such devolution has meant in some cases that Regions have dedicated only intermittent attention to the subject and some have used the *change of use* provisions of Article 41 of the 1928 law or the principle of legitimate possession to reduce the number of lands falling within category A.

### **TRADITIONAL COMMONS TODAY**

As a consequence of the legislative history of traditional commons, three main typologies of commons exist today in Italy today: 1) lands owned by public administrations and in a few cases by private entities<sup>19</sup> over which the local community can exercise rights of common; 2) ‘open’ collective properties, i.e. civic lands attributed to the community of residents within a municipality or fraction (an administrative unit smaller than the municipality) and often administered by the municipality on behalf of the community; and 3) ‘closed’ communal properties, i.e. land owned by a specific community with the legal personality of a private association. In the first and second cases, all the residents of the municipality or the fraction can exercise rights of common on the lands. The rights of common can therefore be acquired and exercised by those who are not the original inhabitants of the lands but have become residents of the municipality/fraction where the common lands are. The rights of common, which include rights of estovers (right to cut wood), grazing rights, right to cut grass, rights to gather wild plants etc. can be exercised only in so far as they serve to satisfy the vital needs of the right holders and their families, hence within the limits of article 1021 of the 1942 Civil Code.

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<sup>19</sup> *Civic uses* on private land are however subject to dissolution as per the 1927 law.

In the third case, the status of rights-holders is granted to those who are the descendants of the ancient inhabitants of the land. Therefore, rights of commons on ‘closed’ communal properties depend on family lineage. Such ‘closed’ communal properties are registered under different denominations in Italy reflecting their historical diversity (e.g. *Regole*, *Comunanze*, *Vicinie*, *Partecipanze*, *Corporazioni*). ‘Closed’ communal properties are very interesting because they have been able to maintain a relevant degree of political and legal autonomy, being regulated by customary law to be found in local byelaws and statutes, some dating back to the Middle Ages. The majority of ‘closed’ communal properties exist today in the mountain areas of Italy. To a certain extent they represent the quintessential form of communal property and the emblem of successful common-pool resources as defined by Ostrom in her well-known 1990 study.<sup>20</sup> Ostrom, drawing on empirical case studies from different regions of the world, demonstrates how certain commons were able to self-regulate and had strong internal rules that allowed their proper functioning. Ostrom’s famous design principles include well-defined boundaries around a community of users and boundaries around the resource system used, collective choice arrangements, rules governing the use of commons that fit the local needs and conditions, graduated sanctions in case of disobedience, accessible and low-cost means for dispute settlement etc.<sup>21</sup> Italian ‘closed’ communal properties satisfy most of these principles that are well set out in their local byelaws and statutes.

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<sup>20</sup> E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, Cambridge University Press, 1990).

<sup>21</sup> [For further discussion of Ostrom’s design principles, see also Rodgers in this volume: eds].

To provide an example, the *Regole* d'Ampezzo, a 'closed' communal property in the Veneto region, is governed by local byelaws, known as *Laudi* dating back to the 13<sup>th</sup> century.<sup>22</sup> There is a general, overarching community *Laudo* as well as a number of more specific ones covering different areas within the communal property. The *Laudi* specify rules regarding the appropriation of resources on the land. The community *Laudo*, approved and modified by the general assembly of the *Regolieri* (the name by which commoners are known in the area) contains norms related to the institutions, decision-making processes and the limits and conditions for the exercise of rights of common. However, rights of commons are inherited only by male children of the *Regolieri* when they turn 25 years old. Women can inherit rights and are registered in the *Regole* Community Land Registry as rights holders only in the event in which there are no male descendants in the family (article 7 of the Community *Laudo*). Moreover, if they marry, they can maintain and pass their rights to their offspring only if their husbands are themselves *Regolieri*, otherwise they will lose their rights (article 7 of the Community *Laudo*). This gender discrimination<sup>23</sup> is by no means exclusive to the *Regole* d'Ampezzo but it characterises many mountain communal properties. Indeed, the *Laudo* of the *Regole* d'Ampezzo is more open to females than are other *Laudi* of neighbouring communal properties. For example, in the communal property of the *Regole* of Comelico rights of commons to women are granted only if they are widows and have at least one son.<sup>24</sup>

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<sup>22</sup> M. Pieraccini, 'A Politicized, Legal Pluralist Analysis of the Commons' Resilience: The Case of the *Regole* d'Ampezzo', *Ecology and Society* 18 (2013) at: <http://www.ecologyandsociety.org/vol18/iss1/art4/>.

<sup>23</sup> [For further discussion on gender discrimination in communal property management, see also Xu and Gong in this volume for examples in the Chinese context and Pienaar in this volume for examples in the South African context: eds].

<sup>24</sup> A. Menardi, 'Il Ruolo della donna nelle *Regole* d'Ampezzo', *Regole* d'Ampezzo 2002 at: <http://www.regole.it/DocAppr/ruolodelladonna.pdf>.

A recent study by Casari and Lisciandra<sup>25</sup> argues that gender discrimination in communal property management in Italian alpine regions<sup>26</sup> has become more intensified in the Modern period (after the 18<sup>th</sup> century), while in the late Medieval period there were a number of ways in which community members could acquire rights of common, including egalitarian inheritance systems. The switch from an egalitarian to a patrilineal system in inheritance regulations emerged, according to the authors, as an attempt to limit the size of the community, controlling net migration through marriage, and protect the economic value of communal properties.

Aside from the economic reasons behind the development of patrilineal systems, the problem is that such gender discrimination clashes with Article 3 of the Italian constitution, which guarantees equal rights to all Italian citizens irrespective of race, gender, language, religion, political inclination and personal and social conditions. This issue has been reviewed by the Constitutional Court.<sup>27</sup> The Court was asked to rule on the constitutional legitimacy of the *Laudo* of the *Regole* d'Ampezzo. The Court ruled that the question was inadmissible taking into account that the *Regole* have the legal personality of a private entity and are regulated by norms and customs, which are not constitutionally recognised laws. Nevertheless, the *Regole* and other communal properties have a powerful public administrative function considering they have to manage their forest and grazing lands to fulfil environmental protection standards. This is required by national laws (the 1971 law, the Galasso law and the 1994 law), as explained above, and in the specific case of Veneto by the Regional law of the 19 August 1996, n. 26. These laws, however, though recognising the public interest function of

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<sup>25</sup> M. Casari and M. Lisciandra, 'Gender Discrimination in Property Rights: Six Centuries of Commons Governance in the Alps', *The Journal of Economic History*, 76 (2016): 559-594.

<sup>26</sup> Their study is primarily concerned with the rights of common in the Trentino region.

<sup>27</sup> Corte cost. sent. n. 917/1998.



the commons, have not turned the communal properties into a subject regulated by public bodies. Consequently communal properties' rules cannot be subject to controls of constitutional legitimacy.

From the brief overview of traditional agrarian commons presented above, a number of general considerations emerge. First, the strong link between local customary practices and regulations for commons' governance has led to a heterogeneous property rights landscape in Italy. Second, the attempt to simplify such heterogeneity by the 1927 law and repositioning common lands within the parameters of public law has been noted. Third, there are certain legal developments post-1927 that have attempted to overcome the levelling philosophy of the 1927 law. Notable in this respect is the transfer of the administrative functions of common lands to the Regions, which, at least theoretically, enables regulatory diversification and more attentiveness to local contexts. Also, it is worth stressing the recognition of mountain communal properties' private juridical personality as well as their public interest function under the 1994 law, discussed above. This leaves the traditional common lands somewhere in between the public and private, rendering the justiciability of customary laws a difficult matter in a civil law system, as exemplified by the Constitutional court ruling on the gender discrimination of the *Regole* d'Ampezzo. It is therefore evident that common lands occupy a complex juridical space, not reconcilable with the orthodox property tradition based on a simplistic civil law distinction between the private-individual and the public-state. The next section introduces the new commons in Italy in order to understand the extent to which they share any traits with traditional agrarian common lands.

## THE NEW COMMONS IN ITALY

### ‘WATER AS A COMMONS’<sup>28</sup> AND THE RODOTÀ COMMISSION

In recent year, the question of the commons (in It., *beni comuni*) has become revitalised in political and juridical debates in Italy. Bottom-up movements for the legitimisation of commons have taken concrete forms. Examples include the 2011 referenda where citizens voted, inter alia, against the privatisation of water services; the occupation by a diverse range of activists (students, lawyers and artists) of urban cultural spaces such as the Cinema Palazzo and the Valle Theatre in Rome or the occupation of abandoned and degraded buildings such as former hospitals and monasteries in Naples and Messina. Another example is the protest movement against the construction of a high speed rail system in the Valley of Susa (Piedmont), seen as an infrastructure project *un-commoning* the Alpine landscape. These movements, all employing the discourse of the commons, are explicitly positioning themselves as collective attempts to fight against neo-liberal policies and laws. Commons’ discourses are used as a check on government attempts to sell natural and cultural resources. So, for example, the occupation of the Valle Theatre was a protest against the municipality’s decision to lease the theatre to a private operator as a result of the economic crisis. It is not the aim of this section to provide an overview of the varied movements and *commoning* practices currently emerging in Italy but to provide a few remarkable examples engaging with the notion of property that show how discourses on new commons help to reframe the notion of property and what role law performs in this reframing.

By bringing these examples, the way in which official law is contested yet at the same time strategically employed will be visible as well as the way in which the discourses on the new

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<sup>28</sup> ‘Acqua bene comune’ transl. ‘Water as a commons’ is the slogan of the Italian forum against the privatisation of water services. See: <http://www.acquabenecomune.org/>

commons push for both substantive and procedural changes in an attempt to democratise property.

At the core of the new commons movement in Italy there is a rejection of anachronistic and rigid legal frameworks. The discussions regarding the Civil Code's chapter on property (Chapter 3, Title 2) is emblematic in this respect. The Civil Code defines property according to title, distinguishing between private and public property. The simplistic public/private dichotomy linked to the equation of property with title is rejected by the commons' activists promoting a different conceptualisation of property. This different conceptualisation is not only endorsed by dissident marginal groups and counter-hegemonic social movements but it has been articulated in reformist proposals advanced by the Rodotà Commission in 2007 and even internalised by the Italian Supreme Court (Corte di Cassazione) in 2011, as discussed in turn below. A Commission headed by the jurist Stefano Rodotà was nominated by the Ministry of Justice decree in 2007 with the task of drafting a proposal to reform the Civil Code's provisions on public property (Chapter 3, Title II), never modified since its initial publication in 1942. The obsolete character of Chapter 3 was evident for instance in the lack of inclusion of immaterial goods, explicable because the notion of property in 1942 was anchored to real property, and in the lack of strong protection measures for natural resources (such as water, forests, endangered species and habitats). Besides, the reform was also considered as a method to limit the incremental privatisation of public assets in Italy. According to a study carried out by the Accademia Nazionale dei Lincei, Italy was the leading country worldwide between 1992 and 2000 in privatising assets.<sup>29</sup>

Innovatively, the Rodotà Commission proposed a reclassification of property, which abandoned the formal link between property and title giving prominence to the

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<sup>29</sup> S. Bayley and U. Mattei, 'Social Movements as Constituent Power: The Italian Struggle for the Commons', *Indiana Journal of Global Legal Studies*, 20 (2013), 965-1013.

purpose/function of property and including the commons as a new category.<sup>30</sup> The argument was that the commons did not fit within the category of public goods. This is because commons should be defined by their social/public function, and hence could also be owned by private bodies as long as they fulfilled a social/public function. According to the Rodotà Commission, the commons are those goods enabling the exercise of fundamental rights both substantive and procedural sanctioned by Articles 2 and 3 of the Constitution. The commons are also informed by the principle of intergenerational justice as they implicate the interests of future generations. Archaeological, cultural, landscape and a number of natural resources (air, lakes, forests etc.) are listed in the Rodotà Commission proposal as commons in what is stated to be a non-exhaustive list. It is worth remarking that ownership is not in question: the commons can be privately owned or property of the state as long as the public use and social function of the commons are guaranteed.

The Rodotà Commission forged strong links between the concept of the commons and the Italian Constitution, not only by referring to Article 3 to reach a more egalitarian society but also by emphasising that the Constitution does recognise the social function of property in Article 42. Article 42 of the Italian Constitution does divide property into public and private but it also states that ‘Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired, enjoyed *and its limitations so as to ensure its social function and make it accessible to all*’ (emphasis added). Even though the Rodotà proposal has never been discussed in Parliament, one could infer that it is Rodotà’s creative reading of the Constitution and its reformist attempts that influenced greatly the reading of the Supreme Court in the case concerning the fishing valleys of Venice, discussed below.

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<sup>30</sup> Article 1(3)(c) of the Commission Bill, Delegated Legislation to Reform the Civil Code Articles Concerning Public Property, Atto Senato n. 2031, XVI Legislatura proposta legislativa, available at: <https://www.senato.it/service/PDF/PDFServer/DF/217244.pdf>.

## THE NEW COMMONS IN COURT

The case here discussed relates to the disputed juridical nature of fishing valleys at the margins of the Venetian lagoon. Fishing valleys are areas of land with bodies of water surrounded by barriers. The public administration claimed that the valleys were state property as they are part of the maritime domain, as sanctioned by Article 28 of the Italian Navigation Code. Under the Italian Civil Code, the goods of the public maritime domain are not available for purchase and are under state ownership (Article 822 and Article 823). On the other hand, fish farming companies claimed ownership of those valleys on the basis of a title of ownership registered in the land registry since the 19th century. The legitimate expectation of the companies was also validated by the customary practice of granting individuals title to the fishing valleys and tolerating their continued occupation and use of them since the fifteenth century. This conflict was resolved by the Italian Supreme Court in 2011 by reference to the commons. It is the first time that the Court engaged with the concept of the commons to resolve an ownership dispute.<sup>31</sup> What is interesting in this case is that the Italian Supreme Court provided an expansive reading of the meaning of property, drawing on the concept of the commons and key constitutional principles. However, despite the innovative reasoning, the Court's answer was not entirely satisfactory, remaining trapped into the existing property categories defined in the Civil Code and deciding that the valleys were under state ownership. The possible limitations of the Court interpretation are highlighted by a subsequent decision reached on the same issue by the European Court of Human Rights (ECtHR).<sup>32</sup>

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<sup>31</sup> Cass. civile sez. un., n.3665/ 2011.

<sup>32</sup> *Valle Pierimpiè Società Agricola S.p.a v. Italy*, application no. 46154/11, (23 September 2014). The judgement is available only in French and in Italian.

When deciding the case the Supreme Court drew on the commons discourse to disentangle property from title and therefore, apparently, to overcome the private/public dichotomy sanctioned by the Civil Code. The Court concluded that the valleys have a public-collectivist function and purpose and, as such, are commons regardless of their private or public ownership. The judgement, as translated by the author, reads:

A real estate (immovable property), independently of the title, due to its intrinsic connotations, in particular the environmental and landscape ones, is aimed at the realization of the social State. Such a good, beyond the outdated perspectives of the Roman law *dominium* and of the Civil Code, is a commons, i.e. it is instrumentally connected to the realisation of the public interest, independently of its title.

This purpose-oriented reading of property was supported in the Supreme Court's judgment by reference to key constitutional principles, namely fundamental rights (article 2), landscape protection, today interpreted as including the environment (article 9) and property rights (article 42), thereby giving rise to an understanding of the public good, 'not only as an object of the state but as an instrument aimed at the realisation of the constitutional values'.

It is on this basis that the Supreme Court confirmed that the fishing valleys are state property as the state-collectivity (in Italian: *stato-collettività*), not the state-apparatus/institution (in Italian: *stato-apparato*), is the best institution to represent the public interest and protect the valleys' social and environmental functions as constitutionally acknowledged. Therefore, the Supreme Court rested its reasoning on the overcoming of the outdated private/public distinction by emphasising the purpose of a good over its formal categorisation according to title in the Civil Code and emphasised the role of the State in representing the collectivity and the public interest. Nevertheless, *de facto* it opted for and confirmed state ownership, requiring the fishing company to pay compensation to the public authorities.

Subsequently, one of the fishing companies (Valle Pierimpiè S.p.a.) alleged a violation of Article 1, Protocol 1 ECHR before the ECtHR, arguing that it had been deprived of its property without being compensated for the expropriation and actually having to pay compensation to the public authorities for unlawful occupancy of the valley.<sup>33</sup> Although the Strasbourg Court, similarly to the Italian Supreme Court, recognised the importance of protecting the environment and the ‘public-facing’ purpose of the valleys (para 67), thereby finding legitimate the action of the State also in light of the Art 28 of the Navigation Code, the transfer of the valley to State ownership was found to constitute a manifestly disproportionate interference with Art 1, Protocol 1. The ECtHR further held that the State had not struck a fair balance between the public and private interests at stake and that an excessive and impracticable burden had been imposed on the company. Taking the point of disentangling property from title seriously, the ECtHR pointed out that it is not important whether a good is characterised as privately or state owned but what matters is whether it can fulfil its public-facing purpose. Therefore, the key for the ECtHR is not to resolve the issue by opting for the state ownership of the good, as the Italian Supreme Court did, but by making sure that the management system places obligations and restriction on the owner to safeguard the public interest.

In a sense, we could argue that the ECtHR goes a step further than the Supreme Court in overcoming outdated and rigid understandings of property and refocussing the discourse on management rather than ownership. At the same time, the Italian Supreme Court, by explicitly invoking the commons, and providing an expansive reading of property, also broke new ground. Besides, it could be argued that by speaking about the ‘State-collectively’, it proposed an understanding of the State not so removed from that found in the doctrine of the public trust, where the State holds the natural resources in trust for the public. Moreover, the

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<sup>33</sup> *Valle Pierimpiè Società Agricola S.p.a v. Italy*.

Italian Court reliance on constitutional principles to justify a new understanding of property beyond title is clearly reminiscent of the Rodotà Commission proposed reform of Chapter 3 of the Civil Code.

**‘LIKE WATER AND LIKE AIR. LET’S FREE CULTURE’<sup>34</sup>**

The discourse of the commons in Italy, however, also moves beyond these reformist attempts and constitutionally-based readings of property. The more radical proponents in the commons’ movement, possibly sceptical of unsuccessful reformist attempts (e.g. lack of discussion in Parliament of the Rodotà Commission proposal), propose that one should not assume certain ontological characteristics determining what commons are, as the commons derive from contexts and practices of commoning, practices of sharing and participatory initiatives.<sup>35</sup> The accent is therefore squarely placed on processes of commons’ emergence and a link made between property and deliberative democracy. The commons cannot be essentialised and reduced to a tangible proportion of the external world and the aim is to enable their emergence via deliberative participatory decision-making practices and shared governance to fulfil their social functions. Rights of access to the goods therefore is not the only variable to be taken into account, as rights of access to decision-making is also important in processes of *commoning*. As one of the main radical proponents of the commons writes: ‘the commons project must be as much about a new framework for participatory government as alternative property rights arrangements’.<sup>36</sup>

For Mattei what distinguishes the commons from state and private goods is their inclusive character, both procedurally and substantially. The commons, unlike private goods and some

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<sup>34</sup> Slogan used by the Valle Theatre occupants.

<sup>35</sup> U. Mattei, ‘I Beni Comuni fra Economia, Diritto e Filosofia’, *Spazio Filosofico*, (2013), 111-116 available at: <http://labont.it/wordpress/wp-content/uploads/2013/01/Mattei.pdf>.

<sup>36</sup> Mattei, *Beni Comuni*.



public goods, are not commodities and cannot be reduced to the language of ownership. They express a qualitative relation.<sup>37</sup> The relational character of the commons that defies Cartesian dualisms of the subject (private owner, state) and object (territory) does no longer see the commons as a third way next to state and private property. The commons are conceptualised as a 'a weapon of revolutionary theory and praxis' to develop a new vision rooted neither in the positivistic world of the 'is' nor in the ideological world of the 'ought to be' but in the creative and generative world of the 'could be'.<sup>38</sup>

To a certain extent, this revolutionary potential is embodied in urban occupations carried out in the name of cultural commons, for example the Cinema Palazzo and Valle Theatre in Rome, the Theatre Macao in Milan and the Theatre Marinoni in Venice. There, the occupiers are not contesting the property title but are interested in affirming these spaces as cultural commons in the sense of guaranteeing collective/public use determined through participatory decision-making. Interestingly some of these spaces have developed or at least have aimed to develop their own internal rules, their own bylaws, as in the case of the Foundation established in the Valle Theatre in Rome, which drafted a Statute to legitimise its legal personality as a non-for-profit organisation as defined in article 10 of the legislative decree December 1997, n.460.<sup>39</sup> The Statute was written through participatory mechanisms with drafts discussed online to make it a collective writing effort. The Statute defines the Foundation's aims and activities, membership rules, and bodies operating as part of the Foundation and contains articles related to the drafting of internal regulations and

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<sup>37</sup> Mattei, *Beni Comuni*.

<sup>38</sup> Mattei, 'I Beni Comuni fra Economia, Diritto e Filosofia'.

<sup>39</sup> Statuto Fondazione Teatro Valle Bene Comune at:

<http://www.teatrovalleoccupato.it/wp-content/uploads/2013/10/STATUTO-FONDAZIONE-TEATRO-VALLE-BENE-COMUNE.pdf>.

administration of funds. It is therefore possible to witness the attempt to develop a new internal normative order for the self-organisation of the Foundation. Such a normative order is however very porous, selectively borrowing from existing legal orders. The Preamble of the Statute indeed refers to the principles of the Italian Constitution to guide the work of the Theatre Valle as a commons. Article 43 of the Italian Constitution on the establishment of new enterprises for the common good is considered as the legal basis for the creation of the Foundation.<sup>40</sup> Interestingly therefore, even these more radical *commoning* movements do not reject the law all together but attempt to engage with key constitutional principles.

To bring another example, in Naples the occupation of an abandoned building known as the former kindergarten Filangeri (*ex-asilo Filangeri*) transformed into a cultural commons has been legitimised by the local administration with a municipal resolution of 2012.<sup>41</sup> The municipality recognises the former kindergarten as a space destined to democratic and participative cultural expression, defining culture as a commons. More recently, a second resolution of the municipality of Naples recognises self-governmental arrangements of the former kindergarten as established in a Declaration written collectively over three years by the occupants.<sup>42</sup> Not dissimilarly from the Statute of the Theatre Valle, the Declaration of the former kindergarten Filangeri engages creatively with constitutional principles.<sup>43</sup>

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<sup>40</sup> Article 43 of the Constitution reads: ‘For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers’ or users’ association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest’.

<sup>41</sup> Resolution of the Municipality of Naples of 24 May 2012, n.400.

<sup>42</sup> Resolution of the Municipality of Naples 27 December 2015, n. 893.

<sup>43</sup> Dichiarazione d’uso civico dell’Asilo 2016 at: <http://www.exasilofilangieri.it/regolamento-duso-civico/>.

## CONCLUSION: PROPERTIES OF ITALIAN COMMONS

This chapter has attempted to investigate the meaning of property and property relations in Italian commons, considering both traditional agricultural commons and new commons. There are a number of similarities between traditional and new commons that can be discerned. First, the model of property proposed by both traditional and new commons departs from an ownership model based on the right to exclude and an economic view of property as alienable commodity. Secondly, sustainability is a core element in both traditional agrarian and new commons. In traditional Italian commons this is visible in the principle of inalienability and indivisibility of the land; in the requirement to use commons to satisfy agro-sylvan-pastoral needs and in the legal recognition of the environmental protection functions the commons fulfil. In the discourses of new commons, sustainability also figures predominantly as the commons are suitable spaces to satisfy essential human needs (whether access to vital resources such as water or human dignity).

In regards to the differences between traditional and new commons, the key issue is the type of actors involved and their substantive and procedural property rights. The traditional commons are an example of limited-access commons where the key actors/beneficiaries are the members of a restricted community, identified through residence requirements or determined by agnatic relationships. Although some mountain communal properties satisfy Ostrom's design principles, considerations of democratic decision-making and equality do not necessarily come into play as exemplified by gender discrimination in regard to the distribution of rights of common in northern alpine common properties. By contrast, the beneficiaries of the new commons are the public as a whole (the rights of access to the commons are to be held by all, irrespective of *ius solis* or *ius sanguinis*), therefore representing an example of open access commons. As much as distributive justice,

deliberative democracy is a key consideration in the formation and management of the new commons. In the new commons the public at large is not only entitled to have use rights but also democratic control over decision-making.<sup>44</sup> The fusion between the substantive and procedural dimension in the conceptualisation of rights in new commons derives from the social function that is attributed to property. As the commons are to be a form of property that fulfils human rights, implicates the interests of future generations and should enable collective access and protection of resources valuable to all, it follows that democratic and inclusive decision-making procedures are needed to achieve such aims. The new commons understanding of property has therefore deliberative democracy built-in because the commons are resources that are fundamental not to a particular individual or a specific, geographically bounded group but to all and they therefore need to be managed by all. The discourses and practices of new commons attempt to democratise property, both substantially and procedurally.

To a certain extent the Italian new commons wave can be understood as a form of open commons as discussed by the scholarship on knowledge/cultural commons.<sup>45</sup> Such scholarship has explored knowledge commons such as Wikipedia and open source software stressing their openness to an undefined class of users cf. limited-access commons where a defined set of claimants lays claims in common. As Frischmann et al. explain ‘unlike commons in the natural resource environment, knowledge commons arrangements usually

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<sup>44</sup> A. Di Robilant, ‘Property and Deliberation: A New Type of Common Ownership’ in S. Bailey, G. Farrell and U. Mattei (eds) *Protecting future generations through commons* (Strasbourg: Council of Europe, 2013), pp. 61-79.

<sup>45</sup> See for example Y. Benkler, ‘The Political Economy of Commons’, *UPGRADE* 4 (2003) 6-9; B. Frischmann, M. J. Madison & K. Strandburg (eds) *Governing Knowledge Commons* (New York, Oxford University Press, 2014); M. J. Madison, B. Frischmann, & K. Strandburg, ‘Constructing Commons in the Cultural Environment’, *Cornell L. Rev.*, 95(2010), 657-709.

must create a governance structure within which participants not only share existing resources but also engage in producing those resources and, indeed, in determining their character. In fact, knowledge commons members often come together for the very purpose of creating particular kinds of knowledge resources'.<sup>46</sup> However, there is a key difference between knowledge commons and the Italian new commons. If knowledge commons are generally intangible commons and the community of users is produced by the abstract connection to the resource (=knowledge) rather than by the physical proximity to the resource, the new Italian commons are embodied in physical spaces, be these theatres, hospitals, former monasteries. The occupation of physical spaces and the use of these spaces for cultural activities is a fundamental prerequisite for the creation of the commons. If the embodiment in tangible products is regarded as the creation of a boundary in knowledge commons and therefore as a challenge,<sup>47</sup> Italian new commons are embodied in material spaces. In Italy, the very act of occupying physical spaces is part of the commoning project so that the spaces can be opened up to the public and fulfil their social function.

This by no means should be interpreted as claiming that only new commons fulfil a social function. As it has been stated, the environmental protection function of traditional commons is recognised in Italian law. However, this is not their primary and only function considering that historically they have developed to fulfil the essential needs of a given, bounded community. Besides, traditional commons are not so preoccupied with procedural democracy and constitutional principles that are foundational issues for proponents of Italian new commons.

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<sup>46</sup> B. Frischmann, M. J. Madison & K. Strandburg, 'Governing Knowledge Commons', in B. Frischmann, M. J. Madison & K. Strandburg (eds) *Governing Knowledge Commons* (New York, Oxford University Press, 2014), pp. 1-44 at 16.

<sup>47</sup> Frischmann, Madison & Strandburg, 'Governing Knowledge Commons', at 17.

The new commons lack a precise juridical base and the attempt at inserting the category of the commons into the property chapter of the Civil Code has not been successful. Clearly a legal clarification of the new commons would considerably strengthen their position. Consequently, some Italian scholars have proposed the application of key principles governing *civic uses* (such as sustainable access to the resource, collective belonging, inalienability of the good etc.) to new commons.<sup>48</sup> However, applying traditional commons principles to new commons risks conflating different ways of constructing property relationships, one primarily based on regulating common rights to land with a view to promote the sustainability of the local community and local resources and the other based on a political effort to democratise property, both substantially and procedurally. Applying to new commons, property law principles from traditional commons can therefore turn into a reductionist endeavour, which would undermine the democratic efforts championed by the new commons movement.

This chapter has exposed the fundamental traits of traditional and new commons in Italy to provide a comprehensive overview of the field and search for similarities and differences. Points of contact between traditional and new commons exist, first and foremost the attempt to transcend the public/private dichotomy to be found in the Civil Code and to propose alternative property relations based on sustainable use, rather than title. However, the chapter has stressed that there are also key differences related to actors involved, the weight assigned to democratic decision-making as well as the relationship with constitutional principles. These differences render any attempt at subsuming traditional and new commons under a unified normative framework problematic, leaving open the search for a normative framework, or better normative frameworks for new commons. As has been considered above, a key

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<sup>48</sup> Marinelli, 'Usi civici e beni comuni'; Cerulli-Irelli and De Lucia, 'Beni comuni e diritti collettivi'.

problem of the 1927 law on traditional commons has been its simplifying philosophy. It would therefore be paradoxical if a similar reductionism were to be applied to new commons.